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July 27, 2011

BY E-FILING

Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re: Manufacturers Railway Company – Discontinuance Exemption – In St. Louis, MO., Docket No. AB-1075X

Dear Ms. Brown:

Enclosed for filing in the above-referenced docket please find Manufacturers Railway Company's Petition to Stay Pending Judicial Review.

Very truly yours,

Paul A. Cunningham
Counsel for Manufacturers Railway Company

Enclosure

cc: All parties of record

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket No. AB-1075X

MANUFACTURERS RAILWAY COMPANY
– DISCONTINUANCE EXEMPTION –
IN ST. LOUIS, MO

PETITION TO STAY
PENDING JUDICIAL REVIEW

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MANUFACTURERS RAILWAY COMPANY
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PETITION TO STAY
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In the decision served on July 12, 2011 in the above-captioned proceeding (the "Decision"), the Board authorized Manufacturers Railway Company ("MRS") to discontinue service over its entire system subject to the employee protective conditions set forth in *Oregon Short Line Railroad–Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho*, 360 I.C.C. 91 (1979). MRS would like to discontinue service as quickly as possible to stem its large and growing losses. However, if MRS discontinues service, the payment of labor protection would likewise impose large losses.[1] MRS believes there is no lawful basis for the requirement that it either suffer losses from labor protection payments or continue money losing operations. Accordingly, MRS is seeking appellate review of the Decision to the extent it requires such payments and, pursuant to 49 C.F.R. § 1152.25(e)(7)(iii), hereby respectfully requests that the Board stay the portion of its order requiring such payments pending review.

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[1] MRS's losses from labor protection cannot be determined unless and until all related negotiations and dispute resolution have been concluded but an indication of their potential magnitude is that MRS estimates annual wages and benefits for employees who are union members at roughly $1,303,452 and six times that amount would be $7,820,711.

BACKGROUND

As described in MRS's Petition for Exemption, MRS was initially incorporated in 1887 to handle rail movements originating and terminating at the Anheuser-Busch brewery in St. Louis, Missouri. MRS is currently owned by Anheuser-Busch Companies, Inc. Over the years MRS handled traffic for a variety of shippers at various locations on its system, but Anheuser-Busch, Incorporated ("ABI"),[2] which operates the brewery, is the only currently active customer on the MRS system. ABI no longer ships its outgoing beer by rail, and currently receives, on average, six to seven inbound carloads of grain, celite and magnesite per day. Petition at 3.

The uncontroverted evidence submitted by MRS demonstrated that MRS's operations have become highly unprofitable. MRS lost approximately $700,000 in 2010, and, should it be required to continue operations, would expect to lose $1.4 million this year, and approximately $2 million in 2012 and each succeeding year it remains in operation. Petition at 5-6. There is also no question that there is no reasonable prospect for MRS to operate profitably in the foreseeable future. Petition at 5. Accordingly, MRS sought authority to discontinue rail service over its entire system. Because MRS will have no shipper revenues once it ceased operations, it sought, under longstanding precedent, to be relieved of the obligation imposed on carriers seeking a partial abandonment or discontinuance to pay labor protection supplementing that required by agreements with its employees. Petition at 7.

No one questions that MRS should be allowed to discontinue services over its entire system. Decision at 2-3. The only issue in this proceeding has been whether that discontinuance should be subject to labor protective conditions. Until the Decision, the Board and its predecessor, the ICC, had long held that, subject to two exceptions, "[w]hen issuing

[2] Anheuser-Busch, Incorporated is also a subsidiary of Anheuser-Busch Companies, Inc.

discontinuance authority for railroad lines that constitute the carrier's entire system, we do not normally impose labor protection."[3] Instead, the precedents uniformly exempted entire system discontinuances and abandonments from labor protection conditions when those conditions would (1) "require continued operation for the benefit of employees," (2) require "further consumption of a failed railroad's properties for payment of employees' benefits after operations cease," or (3) "force [the carrier or its parent] to provide the full 6 years dismissal allowance with no hope of reducing this burden by using the employee's services elsewhere." *Northampton & Bath*, 354 I.C.C. at 786. (We refer hereafter to that exemption as the "Entire System Rule" or the "Rule".)

The Decision did not find that either of the possible exceptions to the Entire System Rule applied here. Instead, the Decision broke with the Board's long-standing policy and precedent

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[3] The two exceptions to "normally" have been the existence of: (1) a corporate affiliate that will continue substantially similar rail operations; or (2) a corporate parent that will realize substantial financial benefits over and above relief from the burden of deficit operations by its subsidiary railroad. *Mo. & Valley Park R.R.—Discontinuance Of Service Exemption—In St. Louis County, MO*, STB Docket No. AB 1057X (STB served Jun. 15, 2010) (citing *Wellsville, Addison & Galeton R.R.—Aban. of Entire Line in Potter & Tioga Counties, Pa.*, 354 I.C.C. 744 (1978); and *Northampton & Bath R.R.—Aban. Near Northampton and Bath Junction in Northampton County, Pa.*, 354 I.C.C. 784 (1978)). *See also New Mexico Gateway R.R. LLC – Discontinuance Exemption – in Dona Ana County, NM*, STB Docket No. AB-995X (served Jul. 3, 2006) ("When issuing discontinuance authority for a railroad line that constitutes the carrier's entire system, the Board does not impose labor protection, except in specifically enumerated circumstances"); *Greenville Cnty. Econ. Dev. Corp.—Aban. & Discontinuance Exemption—in Greenville Cnty., S.C.*, AB 490 (Sub-No. 1X) (STB served Oct. 12, 2005) (the railroad's "proposal to abandon and discontinue service over the Northern and Southern Segments constitutes its entire operations [and w]hen authorizing abandonment of railroad lines that constitute the carrier's entire system, we do not impose labor protection"); *Sierra Pacific Indus. – Abandonment Exemption – in Amador County, CA*, STB Docket No. AB-512X, slip op. at 8 (STB served Feb. 25, 2005) ("it is well settled that employee protective conditions will not be imposed when a carrier abandons or discontinues service over its entire common carrier system."); *Central Of Tenn. Ry. & Nav. Co. – Discontinuance Of Service Exemption – In Bastrop, Burnet, Lee, Llano, Travis & Williamson Counties, TX*, STB Docket No. AB-501 (Sub-No. 3X) (STB served Aug. 11, 2000) ("we do not normally impose employee protective conditions when a carrier discontinues all of its regulated rail operations").

and imposed employee protective conditions as set forth in *Oregon Short Line* on the grounds that the Entire System Rule did not apply here because neither the ICC nor the Board had previously applied that rule in a case such as this, where, after discontinuing service, the carrier would continue to own its lines and would remain subject to the Board's jurisdiction. Decision at 5-6. The Decision did not explain how such ownership and jurisdiction could logically operate to abrogate the policy established by the prior cases as the basis for the Rule. Nor did the Decision address whether imposition of the conditions would require continued operation of MRS, further consumption of MRS resources after discontinuance, or whether MRS would be forced to provide 6 years of benefits without any ability to mitigate that burden by using employees to provide services elsewhere.

By drawing a seeming distinction based on continuing line ownership, and therefore, continuing agency jurisdiction, but abandoning completely the policy underlying the Entire System Rule, the Decision nominally preserves, but logically eviscerates that Rule. The Decision neither distinguishes the earlier policy, nor articulates an economically grounded and fair new policy.[4] Instead, it appears implicitly to announce a new policy – one never before expressed by the agency, and not legally sustainable – that labor protective conditions are to be imposed on licenses to terminate all of a carrier's services regardless of the underlying economic circumstances of the transaction. Any such view of labor protection would fundamentally misapprehend the purposes of labor protective conditions. These conditions were not intended as a general supplement to bargained-for or otherwise provided compensation and benefits,[5] but

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[4] The Decision appears to distinguish entire system discontinuances over lines owned by the carrier from entire system abandonments but offers no policy basis for the distinction. Decision at 6.

[5] *CSX Corp. - Control - Chessie Sys., Inc., (Arbitration Review)*, ICC Finance Docket No. 28905 (Sub-No. 23) (ICC served Sep. 15, 1989) (purpose of labor protective conditions is "to

were intended to facilitate efficiency enhancing steps by railroads that would continue in service, and be more capable to serve the public as a result.[6] Absent that facilitation, changes to rail operations that were no longer self sustaining could be impeded by labor action, and the public interest would be harmed.[7] Here, as in other system-wide cessations of service, the purpose of the discontinuance is to stem losses which cannot be remedied without such cessation. And where, as here, there is no public purpose to be served by supplemental labor protection, the law has long held that such protection will not be imposed.[8]

For this reason, the limited exceptions to the Rule focused on the economic circumstances of the transaction. Losing carriers were not made to pay unless there were other, related carriers that would benefit from the transaction by continuing to provide similar rail service, potentially enhanced by the resources made available for the remaining system by the discontinuance or abandonment. *Northampton*, 384 I.C.C. at 786-87. The non-carrier parents of

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ensure that the economies and efficiencies sought by the industry through consolidations and coordinations were not achieved at the sole expense of rail employees" and that labor protective conditions "must be read in conjunction with the decision authorizing the transaction and the public interest factors upon which it is based.")

[6] *CSX Transp., Inc. v. Surface Transp. Bd.*, 75 F.3d 696, 701-702 (D.C. Cir. 1996) (labor protective conditions reflect "congressional concern for balancing the twin public interests of management efficiency through railroad consolidation and labor stability").

[7] *See, e.g., Norfolk & W. R.R. Co. v. Am. Train Dispatchers' Ass'n*, 499 U.S. 117, 133 (1991) (noting that scheme imposing labor-protective conditions in mergers was designed to prevent hold up in achieving the efficiencies of railroad consolidations).

[8] *Okmulgee Northern Ry. Co. Abandonment of Entire Line*, 320 I.C.C. 637, 645-46 (1964) ("the imposition of protective conditions in proceedings such as these, where a carrier proposes to abandon its entire line of railroad normally is not warranted, and would not serve, in most instances, to strengthen the transportation system within the contemplation of the national transportation policy. A departure from this principle in particular cases must be supported by clear and convincing evidence."); *Tennessee Central Ry. Co. (Rodes, Trustee) Abandonment*, 334 I.C.C. 235, 244-46 (1969) (no labor protective conditions imposed where ICC found that labor protective costs would jeopardize the resumption of service and subvert the broader goal of maintaining transportation).

an abandoning or discontinuing carrier could be made to pay if that parent would receive a substantial benefit from the disposition of the carrier's property over and above its investment in the carrier. *Id.* Either way, labor protective conditions were imposed only where there was an increase in economic wealth beyond the simple avoidance of losses. This approach was therefore consistent with constitutionally acceptable notions of regulation – that a regulated entity may not be forced to continue operating at a loss simply to serve the public,[9] but that when the entity benefits beyond the mere cessation of losses, some of that benefit might be used to provide benefits to affected employees. *See, e.g., Northampton*, 384 I.C.C. at 786-87. From that perspective, it is clear that the Decision, should it stand, would impose a new burden on money losing carriers and forge an entirely new labor protection policy.

In any event, as a result of the Decision, MRS is now caught in the untenable Catch-22 that the Board's long-standing precedent was explicitly intended to foreclose. Even though there is no economic demand for its services, and the public interest does not otherwise require those services, the Decision requires MRS to either operate at a loss, or pay labor protection at a loss, for no apparent reason other than to benefit of MRS's employees.[10]

MRS must therefore seek judicial review of the Decision, and respectfully requests a stay pending that review so that it can immediately alleviate the significant burden of continued operations without the risk of incurring penalties for violation of the Board's labor protection conditions.

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[9] *See* Section I.A, *infra.*

[10] MRS currently sees no lawful alternative. If MRS were to discontinue operations but not pay labor protective benefits it would risk civil penalties for non-compliance with a Board order. *See* 49 U.S.C. § 11901.

The standards governing disposition of a petition for stay are: (1) whether petitioner is likely to prevail on the merits; (2) whether petitioner will be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would substantially harm other parties; and (4) whether issuance of a stay would be in the public interest. *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977), and *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958). The party seeking a stay carries the burden of persuasion on all of the elements required for a stay. *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974). As elaborated below, MRS's stay request meets those standards and should be granted.

I. MRS Is Likely To Prevail On The Merits

Despite the Entire System Rule, the Decision imposed labor protection conditions *sua sponte*: the nominal rationale was not suggested by any party, was not subject to briefing by the parties, was based on a distinction never previously drawn by the Board, and has major policy implications apart from this proceeding. The ultimate holding of the Decision results in an unconstitutional taking, is an arbitrary and capricious departure from the Board's long-established policy, and is based on two asserted but arbitrary and capricious (and constitutionally suspect) distinctions between (1) entire system discontinuances over lines owned and not owned by the carrier and (2) an entire system discontinuance and an entire system abandonment. The Decision is likely to be reversed on appeal.

A. The Decision's labor protection mandate, which is tantamount to a requirement that MRS keep operating at a loss, is an unconstitutional taking

As early as 1920, the Supreme Court, in *Brooks-Scanlon Co. v. R.R. Commission*, 251 U.S. 396 (1920), recognized that a privately financed railroad is under no obligation to continue hopelessly unprofitable services, holding that a railroad "may withdraw its grant by discontinuing the use when that use can be kept up only at a loss." *Id.* at 399. A year later, the

Supreme Court expanded that doctrine for the benefit of a carrier's creditors and investors, holding that "[a]part from statute or express contract, people who have put their money into a railroad are not bound to go on with it at a loss if there is no reasonable prospect of profitable operation in the future." *Bullock v. R.R. Comm'n of Fla.*, 254 U.S. 513, 520 (1921). *See also R.R. Comm'n of Tex. v. E. Tex. R.R.*, 264 U.S. 79, 85 (1924) ("The usual permissive charter of a railroad company does not give rise to any obligation on the part of the company to operate its road at a loss. . . . The company, although devoting its property to the use of the public, does not do so irrevocably or absolutely, but on condition that the public shall supply sufficient traffic on a reasonable rate basis to yield a fair return"); *Chicago & N.W. Transp. Co. v. United States*, 678 F.2d 665, 668 (7th Cir. 1982) ("The government may not force a railroad to operate a line at a loss for an indefinite period of time"). To hold otherwise would constitute a regulatory "taking" in violation of the Due Process Clause of the Fifth Amendment. *R.R. Comm'n of Tex.*, 264 U.S. at 85 ("To compel it to go on at a loss or to give up the salvage value would be to take its property without the just compensation which is a part of due process of law.")

These cases were either decided prior to the statute requiring a carrier to seek regulatory authority for abandonment or discontinuance before ceasing operations on a line or did not discuss it. Nonetheless, courts have noted that "[t]he constitutional principle embodied in these decisions retains its vitality; a railroad cannot be compelled to continue unprofitable operations indefinitely." *Gibbons v. United States*, 660 F.2d 1227, 1233 (7th Cir. 1981). However, while the "fundamental principle of *Brooks-Scanlon* remains unimpaired, the right to withdraw the grant has been procedurally qualified in two ways." *In re Penn Cent. Transp. Co.*, 384 F. Supp. 895, 919 (Regional Rail Reorg. Ct. 1974).

First, a reorganization court must be allowed a reasonable time to determine whether reorganization "or a disposition more consistent with the public interest than liquidation can be found." *Penn Central*, 382 F. Supp at 919. Second, "liquidation cannot commence until public bodies, acting under statutory authority, have had a reasonable opportunity to consider and act upon the proposed abandonment." *Id.* "This is true even when the Constitution requires that a certificate of abandonment must ultimately issue, since such proceedings give other parties, notably public authorities, a final opportunity to come up with plans that may prevent serious injury to the public interest." *Id.* Neither of these two "qualifications" of the doctrine apply here, since MRS is not proceeding before a reorganization court, and MRS sought, and received, authority from the STB to discontinue service, after the STB and other interested parties "had a reasonable opportunity to consider and act upon" MRS's proposal.

The Decision, however, places MRS in an inescapable Catch 22. Either MRS continues to operate at a loss (which it is not constitutionally required to do) or it discontinues service and is responsible for paying up to 6 years of termination benefits. But once MRS discontinues service, it would have no shipper revenues to fund those benefits,[11] and non-payment would risk civil penalties for violation of a Board order. *See* 49 U.S.C. § 11901 (providing civil penalties for knowing violations of an Board order).

MRS has no lawful means to escape the Decision's Catch 22 by its own actions. MRS cannot be required to cover losses from operations or from labor protection without shipper revenues adequate to fund those payments. Such payments, however, are insufficient to support

[11] MRS may, as it has done in the past, receive business unrelated to its status as a carrier, such as using its track to store empty railcars for others, but that business is sporadic, unpredictable, and generates little revenue. Petition at 5. In the past, however, the agency has found that ancillary services, such as an abandoning carrier's "small and deficit producing boxcar leasing operations are inadequate to justify imposition of employee protective conditions." *Wellsville*, 354 I.C.C. at 746.

continuing operation and will be non-existent after discontinuance. It might be argued that MRS should seek such funds – indirectly through consumption of resources or directly in the form of a contribution -- from its shareholder, Anheuser-Busch Companies, Inc. Neither MRS nor the Board, however, has any authority to require a shareholder to make such a payment, either to sustain operations or to cover Board imposed labor protection payments. *See, e.g.*, *Robinson v. Terex Corp.*, 439 F.3d 465, 468 (8th Cir. 2006) ("A parent corporation is generally not liable for the debts of its subsidiaries, and the doctrine of piercing the fiction of corporate identity should be applied with great caution."). Accordingly, the Decision, which offers no legal means by which MRS could avoid the losses it would incur by either continuing a service that is no longer required by the public interest or by paying labor protection for the right to discontinue service, is an unconstitutional taking, and therefore likely to be reversed on appeal.

B. The labor protection mandate of the Decision, to the extent it implicitly requires MRS to seek abandonment instead of discontinuance, is unlawful.

Except perhaps in the extraordinary circumstances of adverse abandonment, ICCTA leaves it to a carrier to determine whether to abandon its status as a railroad or only to discontinue service. *See* 49 U.S.C. 10903(a)(1) (requiring carriers seeking to abandon any part of its railroad lines or discontinue the operation of all rail transportation over any part of its railroad lines to obtain regulatory approval); *see also Overview: Abandonments and Alternatives to Abandonment*, Office of Public Assistance, Governmental Affairs, and Compliance, Surface Transportation Board (2008 ed.) ("Carriers who own and operate a line may also file for 'discontinuance' authority when they do not want to abandon the line. They may need the line for storage or repair, but they want to discontinue their common carrier obligation to provide transportation service over the line."). If that were not the case, there would have been no reason for Congress to distinguish between discontinuance and abandonment.

It would be entirely reasonable, for example, for a carrier such as MRS to discontinue service and the attendant hemorrhaging of financial resources, in what may be a temporary decline in business, but to retain its carrier status in the event economic circumstances change and lead to a greater demand for its services. *See, e.g., Nat'l Ass'n of Reversionary Prop. Owners v. Surface Transp. Bd.*, 158 F.3d 135, 137 n.1 (D.C. Cir. 1998) ("A line that is no longer in use, but has not been officially abandoned, may be reactivated later and is termed 'discontinued.'"). Once a line has been abandoned and the Board loses jurisdiction, state law reversionary property interests take effect. *See Caldwell v. United States*, 391 F.3d 1226, 1228-29 (Fed. Cir. 2004). This could "result in extinguishment of easements for railroad purposes and reversion of rights of way to abutting landowners," *Rail Abandonments – Use of Rights-of-Way as Trails*, Ex Parte No. 274 (Sub-No. 13), 2 I.C.C. 2d 591 (1986), making it impossible for rail service to be reinstituted in the future if economic conditions changed.

The Decision therefore represents a major change in policy not limited to MRS, or to other carriers with non-carrier parents. It would effectively foreclose any money-losing carrier that owned its own lines from discontinuing service rather than abandoning service. It would also have major implications on rail banking proceedings under the National Trail Systems Act. If a line is railbanked, the rail carrier discontinues service and salvages track and other equipment, the STB retains jurisdiction for possible future railroad use, but the abandonment of the corridor is blocked, even though the conditions for abandonment are otherwise met. *See Caldwell*, 391 F.3d at 1229. If the railbanked line is owned by the carrier and constitutes the carrier's entire system, under the jurisdictional distinction holding of the Decision, the carrier would be responsible for labor protective conditions, even though it would not (and indeed, could not) perform any rail operations or earn any rail revenues.

The Board has been given no general authority to require a carrier to choose abandonment over discontinuance. And, even if it had that authority, as it may in the case of adverse abandonment, it could not exercise that authority except upon a determination that such abandonment instead of discontinuance is required by the public interest. 49 U.S.C. § 10903(d) The Board made no such finding here, and therefore, to the extent it purports to require MRS to seek abandonment or keep operating, its order is unlawful.

C. The Decision's departure from prior policy and precedent and distinction between entire system abandonment and entire system discontinuance is arbitrary and capricious.

Under the Administrative Procedures Act, a Court cannot set aside the STB's decisions, findings, or conclusions unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction[;] . . . or unsupported by substantial evidence." 5 U.S.C. § 706(2)(A), (E). While the scope of review under the "arbitrary and capricious" standard is narrow, agency action is arbitrary and capricious if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Moreover, "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Id.* at 42.

Under this standard, the Decision is arbitrary and capricious in two respects. First, it does not supply a "reasoned analysis" for changing the established policy of not imposing labor protective conditions in entire system abandonments and discontinuances. Second, its distinction

between an entire system abandonment and an entire system discontinuance entirely fails to consider important aspects of the problem and is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[12]

The Board's "longstanding policy" in abandonment and discontinuance cases "has been not to impose employee protective conditions when authority to abandon a carrier's entire system is sought." Decision at 3; *see also* cases cited at note 3, *supra*. This policy has always been based on "the simple realization that there will remain no other rail services performed by the exiting carrier upon which to impose the costs of labor protection" and that "[a]ny other result would simply tax the creditors of the abandoning carrier to provide labor with protection." *Simmons v. ICC*, 697 F.2d 326, 336 (D.C. Cir. 1982) (footnotes omitted). In addition, the agency has refused to impose labor protective conditions that would "require continued operation for the benefit of employees or further consumption of a failed railroad's properties for payment of employees' benefits after operations cease." *Northampton & Bath*, 354 I.C.C. at 786.

That "simple realization" noted in *Simmons* is equally applicable here, because once MRS discontinues all operations, there will "remain no other rail services performed by [MRS] upon which to impose the costs of labor protection." As the only source of such funds, as noted above, could be MRS's parent corporation, the Decision "simply tax[es it] to provide labor with protection." And, the Decision requires either "continued operation for the benefit of employees" (since MRS would be operating at a loss for everyone else) or "further consumption of [MRS's] properties for payment of employees' benefits after operations cease."

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[12] Given the absence of a rational distinction between entire system abandonment and discontinuance, the Decision is also a constitutionally suspect denial of equal protection under the Fifth and Fourteenth amendments. *See*, e.g., *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) (classification for which there is no "reasonably conceivable state of facts that could provide a rational basis for the classification" violates equal protection clause).

Moreover, the Board and ICC both previously and consistently recognized that the practical burden of labor protection in partial system abandonments or discontinuances (as opposed to entire system abandonments or discontinuances) "is mitigated by the fact that employees losing jobs as a result of the abandonment, usually those at the bottom of the seniority list, can soon be absorbed in other operations as a result of growth, attrition or both, whereas no such opportunity exists when all operations are abandoned." *Simmons*, 697 F.2d at 336 (citing *Northampton*, 354 I.C.C. at 786). As is the case here, once MRS discontinues operations over its entire system, "no such opportunity exists" to "mitigate" the "practical burden of labor protection" by reassigning employees to other jobs, since MRS will perform no rail operations.

The imposition of labor protective conditions in this case is therefore a clear break from the Board's established policy, but the Decision does not provide a "reasoned analysis" for such a change. The only explanation offered in the Decision is the fact that because MRS is discontinuing service but not abandoning its lines, it would retain ownership of its lines and remain subject to the jurisdiction of the Board. Decision at 6. Far from being a "reasoned analysis," the distinction drawn by the Decision is one without a difference, and is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

First, neither discontinuance nor abandonment has any necessary impact on the ownership of the lines in question. In entire system abandonments (which the Decision appears to concede would not require labor conditions), the abandoning carrier retains ownership (subject to any other ownership claims) of the lines after exercising its authority to abandon. It can then salvage the material comprising the lines, keep the lines in place, or operate them in private carriage. In every case, however, absent the presence of automatic reversionary rights of other parties, the abandoning carrier retains some "legal authority" by "retaining ownership of its

lines" until it chooses to sell or salvage them, which is a decision separate and apart from the decision to abandon them. Thus, in terms of ownership, there is no difference in fact between an entire system abandonment or discontinuance of owned lines, and no policy or legal difference for purposes of deciding whether to impose labor protection.

Second, the fact that MRS would remain subject to the Board's jurisdiction[13] does not explain why the basis for the Board's Entire System Rule – that a carrier ceasing all operations (whether by abandonment or discontinuance) will perform "no other rail services . . . upon which to impose the costs of labor protection," and has no ability to mitigate the cost by assigning its employees to other areas within its system, *Simmons*, 697 F.2d at 336 – is not as applicable here as in entire system abandonments and discontinuances over lines the carrier does not own. The Decision offers no explanation for how the mere condition of being subject to the Board's jurisdiction will create "rail services upon which to impose the costs of labor protection," *id.*, when MRS has ceased all rail operations.

Instead, the Decision simply asserts that the "rationale behind the Board's policy of not imposing employee protective conditions in entire-system abandonments (or discontinuances on lines that the carrier does not own)—that no carrier remains to provide the benefits sought by employees—does not apply here." Decision at 6. But, as the precedents above make clear, the Entire System Rule has never been based on the fact that ***no carrier*** remains. It has been based on the fact that no ***operating*** carrier remains. The Decision offers no explanation – let alone a reasoned analysis – for the change.[14]

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[13] *See Preseault v. ICC*, 494 U.S. 1, 6 (1990) (noting difference between abandonment and discontinuance and that administrative jurisdiction ceases only upon abandonment).

[14] The Decision rightly does not mention as a distinction any difference in the Board's general conditioning authority that arises under the statute because a carrier chooses discontinuance and abandonment. There is none. As the Board well understands, it can generally

II. MRS Will Be Irreparably Harmed In The Absence Of A Stay

A stay is an extraordinary remedy and should not be sought unless the requesting party can show that it faces unredressable actual and imminent harm that would be prevented by a stay. *See Tri-State Brick & Stone of N.Y., Inc.—Pet. for Declaratory Order*, STB Finance Docket No. 34824, slip op. at 2 (STB served Feb. 12, 2008). Only those injuries that cannot be redressed by the application of a remedy after a hearing on the merits can properly justify a stay. *Callaway* at 573. MRS would be irreparably harmed in the absence of a stay.

The Decision puts MRS in an untenable position – it cannot keep operating without suffering substantial losses, and, were it to cease operations, it would not have shipper revenues to support the labor protective conditions imposed by the Decision. And it cannot help itself, because the only self-help solution to these continuing losses – to cease operations and not pay labor protection – would risk civil penalties from the Board, lawsuits from its employees, and perhaps bankruptcy. Thus, as described above, MRS's continued operations would constitute an unconstitutional taking in violation of the Fifth Amendment, and "[w]hen an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." 11A Charles Alan Wright et al., *Federal Practice & Procedure* § 2948.1 (2d ed. 1995); *see also Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1059 (9th Cir. 2009) ("constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm. Moreover, the loss of one's [business] does not carry

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impose conditions on abandoning carriers as well as it can on discontinuing carriers. The Board has imposed, for example, environmental and other conditions on entire system abandonments, such as conditions on how salvage operations are to occur or to preserve certain structures and right-of-way for trail use). *See, e.g., Knox & Kane R.R. — Abandonment Exemption — In Clarion, Forest, Elk & Mckean Counties, PA*, STB Docket No. AB-551 (Sub-No. 1X) (STB served Nov. 23, 2009) (reopening proceeding involving entire system abandonment with no labor protective conditions to impose environmental and trail-use conditions)

merely monetary consequences; it carries emotional damages and stress, which cannot be compensated by mere back payment of [losses].")

Even in the absence of a constitutional violation, the injury to MRS would be irreparable. As described in its petition, and unchallenged by parties, MRS is currently operating at a substantial loss. It lost $700,000 last year, will likely lose $1.4 million this year, and expects to lose $2.0 million each subsequent year it remains in operation. Petition at 5-6. If it does not discontinue, it would have insufficient shipper revenue to pay its operating expenses. If MRS is forced to keep operating, it could be forced into bankruptcy, which is the sort of irreparable harm for which equitable remedies are available. *See, e.g., Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) (threat of substantial loss of business and certainly bankruptcy qualified as the sort of irreparable harm needed to support preliminary injunction).

Even if MRS were not forced into bankruptcy, it would still face immediate and irreparable harm from substantial unrecoverable economic losses. Generally, economic harm is not "irreparable." However, courts have held that, under some circumstances, economic harm may qualify as irreparable "where a plaintiff's alleged damages are unrecoverable." *Clarke v. Office of Fed. Hous. Enter.*, 355 F. Supp. 2d 56, 65 (D.D.C. 2004); *see Bracco Diagnostics, Inc. v. Shalala*, 963 F. Supp. 20, 29 (D.D.C. 1997) ("While the injury to plaintiffs is admittedly economic, there is no adequate compensatory or other corrective relief that can be provided at a later date, tipping the balance in favor of injunctive relief.") (internal quotations and citation omitted).

In order to be considered irreparable for purposes of a preliminary injunction, unrecoverable losses must have a "serious" effect on a plaintiff. *See Toxco Inc. v. Chu*, 724 F. Supp. 2d at 31; *Mylan Pharms., Inc. v. Shalala*, 81 F. Supp. 2d 30, 42 (D.D.C. 2000) ("Because

[plaintiff] is alleging a non-recoverable monetary loss, it must demonstrate that the injury [is] more than simply irretrievable; it must also be serious in terms of its effect on the plaintiff."); *LG Elecs., USA, Inc. v. Dep't of Energy*, 679 F. Supp. 2d 18, 35-36 (D.D.C. 2010) ("Even assuming [the plaintiff] will not be able to recover monetary damages from [defendant] . . . the financial impact [plaintiff] claims it will suffer does not rise to the level of irreparable harm" because that impact represents only "a minuscule portion of the company's worldwide revenues . . . ."); *Sandoz, Inc. v. FDA*, 439 F. Supp. 2d 26, 32 (D.D.C. 2006) ("A loss of less than 1 percent total sales" — in that case, amounting to nearly $31 million — "is not irreparable harm . . . nor would it threaten the company's very existence.").

There is no doubt that MRS's losses from continued operations would be both irretrievable and serious in terms of its effect on MRS. Once that money is paid out, MRS would have no chance to recover it. If MRS were to continue operating, it expects its revenues from traffic on the line would be approximately $1.28 million per year, and losses would be approximately 56% larger than its expected revenues. Petition at 3. These losses would be far more than "minuscule" to a company the size of MRS – indeed, they would "threaten the company's very existence." The economic damages from operating losses faced by MRS while the appeal is pending therefore meet the standard for irreparable harm.

III. Other Parties Would Not Be Harmed by a Stay

The only other parties to this proceeding are the labor unions that represent the covered MRS employees, and neither those unions nor the employees they represent would be harmed by a stay. No shippers were parties to this proceeding, and no shippers would be harmed by a stay. No shippers have opposed MRS's petition, no shipper would lose service if MRS were able to

immediately discontinue service, and the only currently active shipper on the line has always supported MRS's effort to discontinue service.

Likewise, MRS's current employees would not be harmed by granting the stay petition. As discussed above, MRS is likely to succeed in reversing the Decision on appeal. If MRS wins the appeal, MRS employees would be in the same position as if the condition had never been imposed in the first place, which is the position the stay seeks to replicate. On the other hand, if MRS loses its appeal, it still would have no shipper revenues with which to fund the labor protective conditions. In other words, nothing would change with regard to the availability of funds that the Board may require be used for labor protection, and the affected employees would therefore be no worse off if the stay is granted.

IV. The Public Interest Would Be Served By A Stay

The public interest, as recognized by the longstanding "entire system" doctrine, strongly favors a stay. Granting a stay would allow MRS to immediately discontinue losing operations that are not required by the public interest. MRS cannot discontinue operations without irreparable harm if a stay is not granted. Allowing MRS to discontinue operations is one step in the efficient winding down of the failing railroad, and would further the national rail transportation policy, as set forth in 49 U.S.C. § 10101, by at a minimum:

- minimizing the need for Federal regulatory control over the rail transportation system;
- fostering sound economic conditions in transportation and ensuring effective competition and coordination between rail carriers and other modes;
- reducing regulatory barriers to exit;
- encouraging honest and efficient management of railroads; and

- providing for the expeditious handling and resolution of proceedings required or permitted to be brought before the Board.

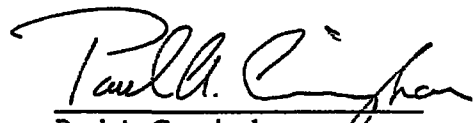
49 U.S.C. § 10101(2), (5), (7), (9), (15).

Moreover, denying the stay would require its parent corporation to continue subsidizing MRS's unprofitable operations by suffering the further erosion of its equity interest for no good purpose. The public interest is not served by requiring entities not subject to the Board's jurisdiction to continue funding the operations of a failing railroad that no shipper requires. .

CONCLUSION

For the reasons described above, the Board should stay that portion of the Decision that conditions the Board's authorization of discontinuance of MRS's entire system on the employee protective conditions set forth in *Oregon Short Line*.

Respectfully submitted,



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July 27, 2011

VERIFICATION

I, Kurt R. Andrew, verify under penalty of perjury that the factual assertions in the foregoing Petition for Stay are true and correct to the best of my knowledge. I also verify that I am qualified and authorized to file this Petition for Stay.

Executed on July 26, 2010

Kurt R. Andrew
President & CEO
Manufacturers Railway Company

CERTIFICATE OF SERVICE

I certify that I have this 27nd day of July, 2011, served copies of the foregoing Petition to Stay Pending Judicial Review upon the following parties of record in this proceeding by first-class mail or a more expeditious method.

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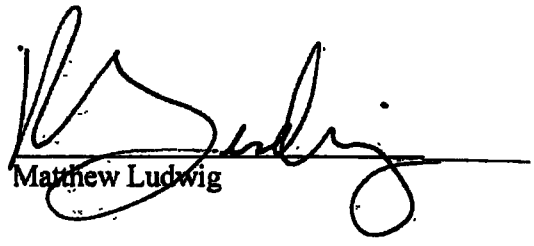

Matthew Ludwig